(3)

No. 91-1252

Supreme Court, U.S.
FILED
APR 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

RICHARD N. DICHARRY
PAMELA G. MICHIELS
PHELPS DUNBAR
Thirtieth Floor
Texaco Center
400 Poydras Street
New Orleans, LA 70130-3245
(504) 566-1311

MICHAEL NUSSBAUM
Counsel of Record
MARTIN R. BAACH
MARK J. LEIMKUHLER
NUSSBAUM & WALD
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 833-8900

LUTHER T. MUNFORD
MICHAEL B. WALLACE
PHELPS DUNBAR
Suite 1400
Mirror Lake Plaza
2829 Lakeland Drive
Post Office Box 55507
Jackson, MS 39296-5507
(601) 939-3895

Counsel for Certain Underwriters at Lloyd's, London

(Counsel for Petitioners Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

DENNIS M. FLANNERY
JOHN R. READ
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Insurance Company of North America

IGNATIUS JOHN MELITO
SIFF, ROSEN & PARKER, P.C.
233 Broadway
New York, NY 10279
(212) 238-8400

Counsel for First State Insurance Company

JOHN P. ARNESS
L. ANTHONY SUTIN
HOGAN & HARTSON
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for Hartford Accident & Indemnity Company

JAMES E. ROCAP, III
MARTIN D. MINSKER
NIKI KUCKES
MILLER, CASSIDY, LARROCA & LEWIN
Suite 500
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Counsel for Aetna Casualty & Surety Company

LAWRENCE E. CARR, JR.
MARGARET H. WARNER
KYLE A. KANE
CARR, GOODSON & LEE, P.C.
Suite 700
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-6063

Counsel for The Continental Insurance Company

RICHARD H. GIMER
STEPHEN L. HUMPHREY
KATHY A. UNDERHILL
RICHARD A. IFFT
HOPKINS & SUTTER
888 16th Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for American Employers' Insurance Company and Employers Commercial Union Insurance Company

BARRY R. OSTRAGER
ANDREW S. AMER
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, NY 10017-3909
(212) 455-2000

Counsel for The Travelers Indemnity Company

JAMES P. SCHALLER
M. ELIZABETH MEDAGLIA
TIMOTHY R. DINGILIAN
JACKSON & CAMPBELL, P.C.
Suite 300 South
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-1600

Counsel for American Home Assurance Company, The Insurance Company of the State of Pennsylvania, and Lexington Insurance Company

ROBERT E. HEGGESTAD
CASEY, SCOTT, CANFIELD
& HEGGESTAD, P.C.
805 15th Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-4082
Counsel for Harbor Insurance Company

JANET R. DAVIS
TRIBLER & ORPETT
30 North LaSalle Street
Suite 2200
Chicago, IL 60602
(312) 201-6400
Counsel for Unigard Security Insurance Company

JAMES W. GREENE
BROMLEY, GREENE & WALSH
1050 17th Street, N.W.
Suite 830
Washington, D.C. 20036
(202) 955-3100
Counsel for American Re-Insurance Company, Unigard Security Insurance Company, Continental Casualty Company, and North Star Reinsurance Corporation

MICHAEL D. GALLAGHER
GERMAN, GALLAGHER &
MURTAUGH
200 S. Broad Street
Suite 500
Philadelphia, PA 19102
(215) 545-7700
Counsel for Stonewall Insurance Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

I. HAD THIS CASE BEEN ADJUDICATED IN THE SECOND CIRCUIT, PETITIONERS WOULD HAVE PREVAILED 1

II. THE APPROACH THIS COURT HAS TAKEN IN REVIEWING STATE LAW RULINGS OF FEDERAL COURTS DOES NOT DETERMINE THE DEFERENCE A CIRCUIT COURT SHOULD ACCORD TO THE HOME CIRCUIT.. 3

TABLE OF AUTHORITIES

Factors Etc., Inc. v. Pro Arts, Inc., 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982) 2

Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co., 842 F.2d 977 (8th Cir.) (*en banc*), *cert. denied*, 488 U.S. 821 (1988) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1252

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, *et al.*,
Petitioners,

v.

INDEPENDENT PETROCHEMICAL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

Respondents offer two arguments in opposition to the petition: (1) there is no conflict between the Second Circuit and the D.C. Circuit; and (2) the approach taken by the D.C. Circuit in this case is in accord with the decisions of this Court. Neither agrument has merit.[1]

I. HAD THIS CASE BEEN ADJUDICATED IN THE SECOND CIRCUIT, PETITIONERS WOULD HAVE PREVAILED

The Second Circuit has crafted a clear and unmistakable standard of deference to a home circuit's ruling on an unsettled question of state law. The home circuit's

---

[1] Petitioners incorporate by reference their list of parties contained in footnote 1 of their Petition for a Writ of Certiorari filed February 3, 1992, in Supreme Court No. 91-1252. Petitioners also incorporate by reference their respective Rule 29.1 statements appearing in Appendix G thereto.

ruling must govern unless it: (a) overlooked existing state precedent; or (b) was superseded by state judicial or legislative pronouncement. *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). *Factors* makes clear that, in the absence of one of these two stated exceptions, revisiting the home circuit's interpretation and application of state law is inappropriate "[h]owever our sense of the common law might lead us to resolve the merits of this case . . . ." *Id.* at 283.

The D.C. Circuit did not find that the home circuit decision in *Continental Ins. Cos. v. Northeastern Pharmaceutical and Chem. Co.*, 842 F.2d 977 (8th Cir.) (*en banc*), *cert. denied*, 488 U.S. 821 (1988) (*"NEPACCO"*), had overlooked state precedent or had been superseded by state judicial or legislative pronouncement. Indeed, the D.C. Circuit acknowledged that the *en banc* decision of the Eighth Circuit had duly considered the relevant principles of Missouri law. But, because the D.C. Circuit had a different sense of how to resolve the merits of the case, it simply substituted its own conclusions for those of the home circuit. *Factors* does not sanction this approach.

The Second Circuit's standard of deference promotes uniformity and equitable administration of state laws in federal diversity cases. The subjective approach followed by the D.C. Circuit produces exactly the opposite result, as evidenced by the outcome in this case. Consider this anomaly: Continental Insurance Company, a party in *NEPACCO* and here, is not obligated to indemnify NEPACCO but must indemnify IPC on the same loss and under the same policy language, simply because IPC filed suit in the D.C. Circuit.

If this case had been adjudicated in the Second Circuit (or, of course, the Eighth Circuit), petitioners rather than respondents would have prevailed. It could hardly be more clear that the two circuits are in conflict and that the conflict is one that affects the just resolution of

cases (like the present insurance coverage action) that could be brought in more than one circuit.

II. THE APPROACH THIS COURT HAS TAKEN IN REVIEWING STATE LAW RULINGS OF FEDERAL COURTS DOES NOT DETERMINE THE DEFERENCE A CIRCUIT COURT SHOULD ACCORD TO THE HOME CIRCUIT

Respondents miss the point in arguing (Opp. at 5-6) that the approach this Court traditionally adopts in reviewing determinations of state law by federal courts of appeal makes it unnecessary for this Court to address the relationship among circuits when issues of state law arise. This Court's interpretation of state law obviously binds all federal trial and appellate courts on the state law point at issue unless and until the state's judiciary or legislature decides otherwise. The fact that this Court might therefore choose not to defer to a federal appellate court's determination of state law says nothing about the extent to which one circuit must defer to a co-equal home circuit. It is undisputed that this Court has never specifically addressed the deference sister circuits must accord to one another. Prior decisions of this Court concerning its own review of state law issues do not address, much less resolve, the conflict between the Second Circuit and the D.C. Circuit on this issue.

Petitioners respectfully submit that the grant of certiorari in this case is the appropriate way to supervise the circuits' determination of state law, thereby promoting uniformity of decision throughout the federal judicial system.

Respectfully submitted,

RICHARD N. DICHARRY
PAMELA G. MICHIELS
PHELPS DUNBAR
Thirtieth Floor
Texaco Center
400 Poydras Street
New Orleans, LA 70130-3245
(504) 566-1311

LUTHER T. MUNFORD
MICHAEL B. WALLACE
PHELPS DUNBAR
Suite 1400
Mirror Lake Plaza
2829 Lakeland Drive
Post Office Box 55507
Jackson, MS 39296-5507
(601) 939-3895

Counsel for Certain Underwriters at Lloyd's, London

MICHAEL NUSSBAUM
Counsel of Record
MARTIN R. BAACH
MARK J. LEIMKUHLER
NUSSBAUM & WALD
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 833-8900

DENNIS M. FLANNERY
JOHN R. READ
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for Insurance Company of North America

IGNATIUS JOHN MELITO
SIFF, ROSEN & PARKER, P.C.
233 Broadway
New York, NY 10279
(212) 238-8400

Counsel for First State Insurance Company

JOHN P. ARNESS
L. ANTHONY SUTIN
HOGAN & HARTSON
Columbia Square
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5600

Counsel for Hartford Accident & Indemnity Company

LAWRENCE E. CARR, JR.
MARGARET H. WARNER
KYLE A. KANE
CARR, GOODSON & LEE, P.C.
Suite 700
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-6063

Counsel for The Continental Insurance Company

RICHARD H. GIMER
STEPHEN L. HUMPHREY
KATHY A. UNDERHILL
RICHARD A. IFFT
HOPKINS & SUTTER
888 16th Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for American Employers' Insurance Company and Employers Commercial Union Insurance Company

JAMES E. ROCAP, III
MARTIN D. MINSKER
NIKI KUCKES
MILLER, CASSIDY, LARROCA & LEWIN
Suite 500
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Counsel for Aetna Casualty & Surety Company

ROBERT E. HEGGESTAD
CASEY, SCOTT, CANFIELD & HEGGESTAD, P.C.
805 15th Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-4082

Counsel for Harbor Insurance Company

JANET R. DAVIS
TRIBLER & ORPETT
30 North LaSalle Street
Suite 2200
Chicago, IL 60602
(312) 201-6400

Counsel for Unigard Security Insurance Company

BARRY R. OSTRAGER
ANDREW S. AMER
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, NY 10017-3909
(212) 455-2000

Counsel for The Travelers Indemnity Company

JAMES P. SCHALLER
M. ELIZABETH MEDAGLIA
TIMOTHY R. DINGILIAN
JACKSON & CAMPBELL, P.C.
Suite 300 South
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-1600

Counsel for American Home Assurance Company, The Insurance Company of the State of Pennsylvania, and Lexington Insurance Company

JAMES W. GREENE
BROMLEY, GREENE & WALSH
1050 17th Street, N.W.
Suite 830
Washington, D.C. 20036
(202) 955-3100

Counsel for American Re-Insurance Company, Unigard Security Insurance Company, Continental Casualty Company, and North Star Reinsurance Corporation

MICHAEL D. GALLAGHER
GERMAN, GALLAGHER & MURTAUGH
200 S. Broad Street
Suite 500
Philadelphia, PA 19102
(215) 545-7700

Counsel for Stonewall Insurance Company

Date: April 13, 1992